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In the Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC., PETITIONER

v.

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether New York's "Son-of-Sam" law impermissibly restricts speech in violation of the First Amendment by providing for sequestration, for certain limited purposes, of proceeds payable to any person with respect to expressive works about that person's crimes.

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INTEREST OF THE UNITED STATES

This case presents the question whether New York's "Son-of-Sam" law—a statute that provides for sequestration of proceeds payable to a person for expressive works about that person's crimes—is consistent with the First Amendment. The United States submits this brief to inform the Court of an aspect of the case not fully addressed by the parties. The Victims of Crime Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. XIV, 98 Stat. 2170, contains provisions, codified at 18 U.S.C. 3681,[1] that resemble the

[1] The full text of Section 3681 is set out as an Appendix to this brief.

New York statute at issue in this case in certain respects but that differ in other significant respects. The United States is filing this brief so that the Court can evaluate the New York statute with more knowledge of the range of forms such statutes can take.

STATEMENT

1. In 1977, New York enacted the so-called "Son of Sam" law, N.Y. Exec. Law § 632-a (McKinney 1982), which generally requires any person "accused or convicted of a crime" in New York to pay over to the Crime Victims Board any moneys that person earns from any book, movie, or other expressive work depicting the person's crimes. *Id.* § 632-a(1).[2] In 1987, New York attempted to enforce Section 632-a against petitioner, the publisher Simon & Schuster, with respect to sums Simon & Schuster had paid to Henry Hill for the book *Wiseguy*, which chronicles Hill's experiences in organized crime.[3] Simon & Schuster then filed an action in the United States District Court for the Southern District of New York, contending that Section 632-a is unconstitutional and seeking declaratory and injunctive relief.

[2] Although the operative section of the statute uses the phrase "accused or convicted," a later section of the statute defines a "convicted" person to include "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." § 632-a(10)(b).

[3] Although Hill apparently was not convicted of the crimes described in the book, the New York Crime Victims Board determined that the book contained his admission to involvement in crimes. Pet. App. 50a. This admission brought Hill within the statutory definition of a "convicted" person set forth in Section 632-a. See note 2, *supra*.

The district court rejected petitioner's challenge. It concluded that the statute imposed only an incidental burden on speech and that the State's interest in compensating crime victims justified this burden. Pet. App. 33a-42a. On appeal, the Court of Appeals for the Second Circuit affirmed. Although it concluded that the statute imposed a direct burden on protected speech and thus was subject to review under a standard of strict scrutiny, it nevertheless upheld the statute on the grounds that it was narrowly tailored to serve the government's compelling interest in preventing criminals from profiting by exploiting the commercial value of stories related to their crimes while their victims went uncompensated.[4] *Id.* at 10a-16a.

2. New York's statute is not unique. As the petition suggests, the United States, as well as a large number of States, have enacted programs based in part on the New York statute. See Pet. App. 59a-60a. The federal statute, 18 U.S.C. 3681, the text of which is set out in the Appendix to this brief, was passed, with strong bipartisan support, as part of the Victims of Crime Act of 1984 (Tit. II, Ch. XIV of Pub. L. No. 98-473, 98 Stat. 2170), after more than a decade of congressional debate regarding the need for the federal government to provide compensation and assistance to the victims of crime. See S. Rep. No. 497, 98th Cong., 2d Sess. 1-2 (1984). In response to the perceived unfairness of leaving victims uncompensated while allowing criminals to profit from reports of their misdeeds, *id.* at 6-7, Congress included

[4] Judge Newman dissented, arguing that the statute could not survive the strict scrutiny applicable to content-based speech restrictions. Pet. App. 20a-26a.

in the Act a narrowly tailored program derived from the New York statute at issue in this case.[5]

The United States' program is an integral part of the sentencing process. As such, at every stage it is subject to discretionary determinations designed to provide appropriate punishment in light of the particular circumstances of the crime, the defendant, and the victim. First, it comes into play only *after* a criminal conviction, only upon the motion of the United States Attorney, and only for specified offenses against the United States.[6] Section 3681(a). Second, even if the U.S. Attorney seeks an order under Section 3681, relief is not automatic. Rather, relief is available only in two circumstances: if "the court determines that the interest of justice * * * so requires" or if "an order of restitution under this title so requires."[7] *Ibid.*

If an order is issued, the proceeds are paid to the Attorney General to be placed in escrow in the Crime

[5] The legislative history of Section 3681 demonstrates Congress's concern for safeguarding First Amendment interests. Many of the distinguishing features of the federal statute were introduced after a speech by Senator Mathias reminding the Senate that "the writings of criminal defendants have played an important role in our society and culture" and that the bill "raises important first amendment questions and demands the most careful scrutiny." 130 Cong. Rec. 23,801 (1984).

[6] The statute applies only to the crime of delivering sensitive information to foreign governments, 18 U.S.C. 794, and to crimes that cause physical harm to individuals. Thus, it would not apply to most of the literary works described in the petition, see Pet. 14.

[7] Orders of restitution issued as part of federal criminal sentences are described in 18 U.S.C. 3663.

Victims Fund[8] in the Treasury for five years after the date of the order. Section 3681(c)(1). During this five-year period, the proceeds may be levied upon, without further proceedings, to satisfy judgments rendered by federal courts with respect to crimes for which the defendant has been convicted or to satisfy fines imposed by federal courts. Section 3681(c)(1)(A). If the court determines that it serves the interest of justice, the funds also can be levied on to pay similar judgments rendered by state courts or to pay legal fees incurred by the defendant in connection with the offense for which he was convicted (but fee payments cannot exceed 20% of the proceeds). Section 3681(c)(1)(B). Finally, at the conclusion of the five-year period, the court has discretion to direct the disposition of any remaining proceeds, and is authorized to require that all or any part of the remaining proceeds be paid into the Crime Victims Fund. Section 3681(c)(2).

SUMMARY OF ARGUMENT

The government has an important interest in limiting the ability of criminals to profit from expressive works that describe their crimes. The United States and many of the States have responded to this interest with statutes that resemble the New York Son-of-Sam law in certain respects, although many of those laws differ significantly from the New York law. The federal statute, for example, does not apply until a person has been convicted and thus may be

[8] The Crime Victims Fund is a separate account in the Treasury—also established pursuant to the Victims of Crime Act of 1984—that is designed to fund state programs providing compensation or other assistance to crime victims. See 42 U.S.C. 10601-10604.

subject to a standard of review less rigorous than that of strict scrutiny. Moreover, as part of the criminal sentencing process, the federal statute serves the government's strong interests in preventing one who has been convicted of a crime from profiting from that crime, in providing restitution to his victims, and in rehabilitating him. In light of the differences among the various statutes dealing with this matter, this Court should resolve the case before it on grounds that do not unnecessarily call into question statutes that differ from the New York statute in relevant respects.

ARGUMENT

I. STATUTES LIMITING THE PROFITS CRIMINALS RECEIVE FROM THEIR CRIMES FURTHER IMPORTANT GOVERNMENT INTERESTS

Statutes limiting the profits criminals receive from expressive works that describe their crimes substantially further government interests of the highest order. As one former Congressman put it in testimony to the Senate Judiciary Committee while the Committee was considering the legislation that led to Section 3681, "there is something basically wrong about a system of justice which allows a criminal to profit from his crime while his victims continue to suffer," *Hearing on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 23 (1984) (statement of M. Butler). The spectacle of criminals profiting from books or movies recounting their unlawful actions understandably and appropriately is perceived as aggravating the harm already inflicted on the victims of those actions. Moreover, such a spectacle can only undermine public faith in the efficacy of the justice system. Because these interests are harmed most

dramatically by works focusing on the criminal's depiction of his crimes, it is not surprising that the statutes themselves typically focus on this type of speech.[9] Thus, we believe the widespread recognition of these interests by the States, and by the federal government, is entitled to respect.

II. IN LIGHT OF THE VARYING FORMS OF SUCH STATUTES, THE COURT SHOULD DECIDE THE CASE AS NARROWLY AS POSSIBLE

We note that this is the first case to come before the Court in this area and that the New York statute that is challenged here represents only one of a range of approaches. The California provision, for example, is drafted as a specialized application of a general statute that places the proceeds of certain conduct in a constructive trust for the benefit of the victim. See Cal. Civ. Code § 2225 (West 1985).[10] Florida has taken yet another approach, creating a statutory lien on the proceeds of certain accounts of felonious crimes. See Fla. Stat. Ann. § 944.512 (West 1985). Some statutes commit all or a portion of funds remaining after satisfaction of judgments against the perpetrator of a crime to general funds for victims of crimes. *E.g.*, Wash. Rev. Code Ann. § 7.68.240 (Supp. 1991) (50% returns to the criminal; 50% goes to the fund).

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[9] To use an example set forth in the petition, Pet. 5, a convict's book regarding prison conditions cannot reasonably be thought to undermine public faith in the criminal process in the same way as a book generating profits from depictions of the convict's criminal actions.

[10] For a detailed analysis of the California statute, see Comment, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1357-1361 (1988).

Still other statutes apply only to actual convictions, as opposed to nonjudicial admissions of guilt. *E.g.*, Wis. Stat. Ann. § 949.165(2)(b) (West Supp. 1990). In view of the range of statutory approaches, we believe it is especially appropriate for the Court to focus on the particular features of the statute before it, and to decide no more than is necessary to the disposition of this case. See *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

III. THE FEDERAL STATUTE IS AN INTEGRAL PART OF THE SENTENCING PROCESS AND SERVES SEVERAL IMPORTANT INTERESTS IN CONNECTION WITH THAT PROCESS

A. The most important feature of the federal statute is the integral role it plays in the sentencing process. Like several other provisions of victim assistance legislation,[11] this statute provides for a new criminal penalty, in addition to the traditional penalties of fines and prison sentences. The penalty authorized by Section 3681 is straightforward: the judge is authorized to order the convicted defendant to turn over to the Attorney General all profits he secures from expressive works related to the crime

[11] For example, the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, includes a provision authorizing sentencing judges to enter restitution orders directly in favor of victims of certain crimes. See 18 U.S.C. 3663. Also, the Victims of Crime Act of 1984, in addition to the remedy set forth in Section 3681, provides for a small special assessment—to be imposed on all persons convicted of crimes against the United States—ranging from five dollars for Class C misdemeanors to $200 for felonies. 18 U.S.C. 3013. These funds go to the Crime Victims Fund described in note 8, *supra*. See 42 U.S.C. 10601(b)(2).

for which he has been convicted.[12] As is traditional in the area of criminal sentencing, the precise amount of any forfeiture is left to the sentencing court's discretion. Here, the court may impose the penalty of forfeiture only if it determines that it is required by a restitution order imposed as part of the sentence or that "the interest of justice * * * so requires." [13]

Accordingly, unlike the speech-related restrictions analyzed in this Court's decisions under the First Amendment, the sanction in Section 3681 is part of the criminal sentence itself. It is, of course, true that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction" and that

[12] Section 3681(c)(2) provides that the funds will be distributed at the end of the five-year period as the court directs. In the absence of judicial interpretation—and there does not appear to have been any to date—it is difficult to predict how sentencing courts ultimately will dispose of these proceeds. (We have been informed by the Office for Victims of Crime in the Department of Justice that the statute has been applied in only a few instances and has not yet generated any significant sum of money.) It is fair to expect, however, that in appropriate cases, remaining funds will go to the Crime Victims Fund, because Section 3681(c)(2) expressly indicates that this is an acceptable disposition.

[13] The reference to the "interest of justice" should enable the court to ensure that the sentence is appropriate in light of the nature of the work. For example, if discussion of the crime constitutes only a small part of the work, it may be expected (in the absence of any unpaid restitution orders) that the trial judge may decide not to enter an order under Section 3681, or to enter an order affecting only a portion of the proceeds. Once again, prediction is hindered by the absence of any cases interpreting or applying these provisions. But it is clear that the statute leaves it to the sound discretion of the sentencing court to ensure that the statute is not applied in ways that do not further its purposes.

they "clearly retain protections afforded by the First Amendment," *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987) (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979)). On the other hand, it also is the case that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system," *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). Indeed, the Court has allowed States to remove voting rights from convicted felons. *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). Criminal convictions, in other words, have been held in appropriate circumstances to warrant deprivations that otherwise would not be acceptable. See *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976).[14]

Thus, it is far from clear that a standard of strict scrutiny should be applied in determining the validity of a provision like Section 3681.[15] Rather, a less

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[14] Similarly, the Court has made it clear in analogous civil contexts that the First Amendment does not prevent federal courts from enforcing federal statutes in ways that limit speech of specified content. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-698 (1978) (rejecting a First Amendment challenge to an order entered under the Sherman Act that prohibited the defendants from making statements that otherwise were legal; explaining that "[t]he standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct"); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969) (explaining that the First Amendment does not bar the NLRB from preventing employers from expressing their sincere beliefs regarding the adverse consequences of unionization).

[15] On this point, we note that Section 3681 evidently is not based on an intention to suppress speech. If Congress had intended to suppress the speech of convicts, it might have

stringent standard may be warranted—one that would recognize the strong government interest in imposing appropriate punishment for criminal conduct and would consider whether the punishment was "reasonably related to the government's legitimate penological interests," *Turner* v. *Safley*, 482 U.S. 78, 89 (1987).

B. Whether the standard is one of strict scrutiny or is less exacting, the integration of the federal statute into the sentencing process serves several com-

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prohibited persons convicted of federal crimes from participating in expressive works describing their crimes. Rather, it appears that Congress was seeking to further the twin aims of enhancing the prospects for compensation of the victims of crimes and of preventing convicts from profiting by exploiting the public taste for depiction of crimes. Complete suppression of speech would not be necessary to further these interests. Indeed, it would frustrate them by limiting the profits available to compensate victims.

Similarly, it is important that the primary purpose of Section 3681, although it may be characterized as content-based, is not to regulate speech "out of concern for its * * * *communicative* impact," *United States* v. *Eichman*, 110 S. Ct. 2404, 2409 (1990) (emphasis added). The principal reason for singling out this speech is not a fear that it will persuade its audience of the truth of some unorthodox and disfavored message, but rather a concern that dissemination of the speech is particularly likely to aggravate the harms suffered by the victims of the crimes committed by the speaker. See Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 335-338 (1991) (arguing that a principal purpose of the First Amendment is to prevent the government from limiting speech "on the ground that the speech is likely to persuade people to do something that the government considers harmful"); cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-50 (1986) (applying a lower standard of scrutiny to a regulation that focused on the secondary effects of the speech).

pelling interests. Most significantly, as part of a sentencing statute, Section 3681 constitutes a particular application of the recognized principle that the government is entitled to recover from a convicted criminal the proceeds of his crime. The convict who has committed murder has no greater right to profit from his crime than the bank robber has to profit from his. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 629-631 (1989) (recognizing the strength of the government's interest in recovering forfeitable assets).

This interest is particularly important here, where the primary purpose of the forfeiture is to enhance restitutionary justice by creating a fund to satisfy judgments rendered in favor of victims.[16] Because those convicted of crime frequently are judgment-proof, it seems entirely appropriate for Congress to

[16] Indeed, except for the payment of the criminal's fines and a narrow allowance for the defendant's attorney's fees, Section 3681(c)(1)(B), compensation of victims of the crime is the only purpose to which the assets can be put for five years. After five years have passed, during which time it may be assumed that the criminal's victims (or their representatives) will have had an opportunity to claim compensation, the trial judge has discretion to direct the final disposition of the funds.

Section 3681(c)(2) provides that, after five years, remaining funds may be paid to the Crime Victims Fund, and thus be made available to assist other crime victims. Although this disposition may go beyond the government's restitutionary interest (by taking more of the criminal's assets than is necessary to compensate the victims of *his* crimes), it plainly serves the government's salutary interest in compensating all crime victims; if the government is entitled—as it surely is—to forfeit the proceeds of crime and deposit them in the general treasury, then *a fortiori* it is entitled to forfeit the proceeds and use them to compensate and assist the victims of crime.

earmark this particular source of a criminal's funds —earned from exploitation of his crime—for payment of judgments obtained by his victims.[17]

We note also that a forfeiture order of this kind may be seen as serving not only the goals of retribution and compensation of victims, but also of rehabilitation. By requiring that the profits arising out of their crimes be expended on compensation to and assistance of the victims of crimes, the statute may help criminals to recognize the tragic costs that criminal actions impose on victims. See Lamborn, *Remedies for the Victims of Crime*, 43 S. Cal. L. Rev. 22, 27 (1970); *United States* v. *Brown*, 744 F.2d 905, 909 (2d Cir.), cert. denied, 469 U.S. 1089 (1984); cf. *Kelly* v. *Robinson*, 479 U.S. 36, 52 (1986) (noting that criminal restitution orders further the state's interest in rehabilitation).

CONCLUSION

The New York statute before this Court is only one of many programs adopted by state and federal legislatures in order to further the public interest in preventing criminals from profiting from their crimes. We urge the Court to recognize the substantial interests underlying all these statutes; at the same time, we urge that on this first occasion involving a challenge to the validity of such a statute, the

[17] Compare *Hearing on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 23 (1984) (statement of M. Butler) ("In my view, this legislation does little more than extend a well-established principle of the law which allows a claimant to attach a defendant's property when the claimant's possibility of recovery is in jeopardy.").

Court's decision should be no broader than is necessary to resolve the case at bar.

Respectfully submitted.

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APPENDIX

18 U.S.C. 3681:

(a) Upon the motion of the United States attorney made at any time after conviction of a defendant for an offense under section 794 of this title or for an offense against the United States resulting in physical harm to an individual, and after notice to any interested party, the court shall, if the court determines that the interest of justice or an order of restitution under this title so requires, order such defendant to forfeit all or any part of proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.

(b) An order issued under subsection (a) of this section shall require that the person with whom the defendant contracts pay to the Attorney General any proceeds due the defendant under such contract.

(c)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may—

(A) be levied upon to satisfy—

(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such

defendant has been convicted, or a legal representative of such victim; and

(ii) a fine imposed by a court of the United States; and

(B) if ordered by the court in the interest of justice, be used to—

(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and

(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.

(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

(d) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

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